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IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

DANIEL A. BUCKLIN,
Plaintiff in Error.
vs.
THE UNITED STATES,
Defendant in Error.
Case 15845.

572

OCTOBER TERM, 1895.

Brief and Argument of Plaintiff in Error.

—BY—

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DANIEL A. BUCKLIN,
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Defendant in Error.
Case 13845

OCTOBER TERM, 1895.

Brief and Argument of T. T. Taylor and Davidson & Williams, Counsel for Plaintiff in Error.

STATEMENT OF FACTS.

At the September term of the District Court, within and for the Second Division District of Kansas, the Plaintiff in Error, Daniel A. Bucklin, was indicted for violation of Section 5392 of the Revised Statutes of the

United States; with having committed perjury in certain testimony which had been taken by H. P. Wolcott, Register of the Land Office at Larned, Kansas, on the 26th day of February, 1892, in a contest proceeding between this Plaintiff in Error and one, M. A. P. Swacker, the prosecuting witness in this action.

There was indicted at the same time one, George Elder, and one, Thomas M. Bucklin; each charged in separate indictments with having committed perjury at the same time and place, and in the same proceeding; they being witnesses for the Plaintiff in Error, Daniel A. Bucklin in said contest proceeding.

Said cause coming on for trial at the March Term of said District Court, all three cases were tried together, and to the same jury. And the jury having heard all the testimony, the arguments of counsel, and being instructed by the Court, retired to consider their verdict, and after having been out deliberating upon their verdict for three days, came into Court for further instruction, and in open Court, and in the presence of the Plaintiff in Error and counsel, through their foreman, propounded to the Court the interrogatory: "Can we agree as to some of the defendants and disagree as to one?" To which the Court replied: "You can convict all of the defendants, or you can convict some and acquit some, but you cannot agree upon a verdict as to some, and disagree as to one or more."

Whereupon the jury again retired, and after having been out a few minutes only, returned into Court a verdict of not guilty as to Thomas M. Bucklin and George Elder, but a verdict of guilty against this Plaintiff in Error.

That afterwards, on the 13th day of March, and at the same term of said Court, the Plaintiff in Error filed

his motion to set aside the verdict and grant a new trial. Which motion was by the Court overruled

That afterwards, on the 1st day of April, 1893, and at the same term of said Court, the Plaintiff in Error filed his motion in arrest of judgment, which motion was by the Court overruled.

Whereupon the Court rendered judgment upon said verdict and sentenced the Plaintiff in Error to the Kansas penitentiary, at Lansing, Kansas, for the period one and a half years from the first day of June, 1893, and that he pay a fine unto the United States of America in the sum of one hundred dollars.

That afterwards, to-wit: On the first day of June, 1893, the Plaintiff in Error procured to be settled and signed and filed in said cause, as a record in said Court, his bill of exceptions, leave having been given the Plaintiff in Error until the said 1st day of June, 1893, to have said bill of exceptions settled and signed.

That afterwards, to-wit: On the 4th day of March, 1895, and within two years from the rendition of the judgment in this action, the Plaintiff in Error presented to the Hon. John A. Williams, Judge of the United States District Court for the district of Kansas, Second Division, his petition for writ of Error, which writ of error to the United States Supreme Court was by said Hon. John A. Williams, Judge, allowed, as shown by the record herein.

(This is the same as Case No. 15,343, October term, 1893, which was brought to this Court on appeal, but the Plaintiff in Error not being satisfied that an appeal was the proper practice to have the case reviewed by this Honorable Court, prosecutes this writ of error.)

ASSIGNMENT OF ERRORS.

The Plaintiff in Error assigns as errors occurring at the trial of said cause, the following :

First :—That the Court erred in permitting the three cases, to-wit : The United States vs. Thomas M. Bucklin, The United States vs. George Elder, and The United States vs. Daniel A. Bucklin, to be consolidated and tried together to the same jury ; each of said defendants having been separately indicted.

Second :—The Court erred in its reply to the question of the foreman of said jury which tried said cause, when said jury, after having deliberated upon their verdict for three days, on the 11th day of March, 1893, came into Court, and the foreman asked the Court if the jury could agree as to some of the defendants and disagree as to one. To which question the court replied : "I think not. The jury can convict some of the defendants, or acquit some, or find all guilty or all not guilty, but they cannot find a verdict as to some and disagree as to one or more."

Third :—The Court erred in overruling Plaintiff in Error's motion for a new trial.

Fourth :—The Court erred in overruling Plaintiff in Error's motion in arrest of judgment.

Fifth :—The Court erred in rendering judgment of conviction in said cause against the Plaintiff in Error.

ARGUMENT.

In the bill of exceptions taken by the Plaintiff in Error in the Court below, and found upon page 34 of the record in this cause, will be found the instruction of the Court to the jury, in answer to a question propounded by the foreman of the jury; which is as follows: "Can we find a verdict as to some of the defendants and disagree as to others?" To which the Court answered and instructed the jury: "You can find a verdict of guilty as to all of the defendants, a verdict of not guilty as to all of them, or you can find a verdict of guilty as to some, and not guilty as to others, but you cannot find a verdict as to some and disagree as to one or more." To this instruction the Plaintiff in Error, as stated, excepted.

This instruction is in conflict with section 1036, chapter 18, of the United States statutes, and therefore erroneous. Said section 1036 reads as follows: "On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the othe defendants may be tried by another jury."

Except for this instruction the verdict of guilty against this Plaintiff in Error may never have been found.

The Court also erred in overruling Plaintiff in Error's motion for a new trial in this cause for the further reason that the verdict given in said cause was contrary to the weight of the evidence and the law of the case.

The indictment in this cause charges the Plaintiff in Error with committing perjury in certain testimony which he gave before H. P. Wolcott, Register of the

Land Office in a contest proceeding between himself and the prosecutrix in this cause, M. A. P. Swacker. Which testimony was written and introduced in evidence.

The indictment alleges that at said time and place, and in said testimony, the Plaintiff in Error testified to nine distinct material facts in said contest proceeding which were false, as follows, to-wit:

First:—That Margueriete A. P. Swacker, formerly Margueriete A. P. DeLangtry, failed to break or plow, or caused to be broken or plowed, five acres of land above described the first year of her entry.

Second:—That within the second year of her entry the said Margueriete A. P. DeLangtry, now Margueriete A. P. Swacker, failed to break or plow, or caused to be broken or plowed, five acres of the tract of land above described, and has failed to cultivate or otherwise five acres of said land above described.

Third:—That she failed to cultivate five acres of said land, and failed to plant trees, timber, seeds or cuttings the third year of her entry.

Fourth:—That she failed to plant timber, trees, seeds or cuttings on five acres of said land the fourth year of her entry.

Fifth:—That she failed to plant trees, seeds or cuttings on five acres of said land during the fifth year of her entry.

Sixth:—That she failed to plant the requisite number of trees, timber or cuttings, and to cultivate said tract of land the sixth year of her entry.

Seventh.—That no planting of trees, seeds or cuttings had been done on the land above described since 1889.

Eighth.—That she, the said Margueriete A. P.

Swacker, formerly Margueriete A. P. DeLagntry, had offered to sell or trade said tract of land above described.

Ninth.—That she abandoned said land prior to the 14th day of January, 1892.

Upon an examination of the testimony (Page 27 of the record.) as given before Mr. Wolcott, Register, by the Plaintiff in Error, and in which testimony the perjury is alleged to have been committed, we find that Daniel A. Bucklin, the Plaintiff in Error, gave no testimony before the Register as to the first, second, third, fourth, fifth, sixth and ninth allegations of perjury as laid in said indictment, but that the only two allegations of falsity set forth in said indictment about which the Plaintiff in Error did testify were the seventh and eighth. The seventh being that no preparation of the ground, or planting of trees, seeds or cuttings had been done on the land since 1889. The eighth being, that the prosecutrix, M. A. P. Swacker, had offered to sell or trade said land.

We find in the testimony of Daniel A. Bucklin, before Mr. Wolcott, Register, as to the seventh allegation of falsity, when the question was propounded to him: "Has there been any additional planting of trees, seeds or cuttings since 1889, or has there been any cultivation of the trees planted in 1889, to the present time?" He answered, "There has not."

It will be observed that this question propounded by the Register of the Land Office, is a compound question, or two questions in one, and that the Plaintiff in Error makes the general answer, "There has not." He was right with reference to the fact that there was no planting of trees, seeds or cuttings since 1889. Because we find in the testimony of the prosecutrix on page 30 of the record, in the sixth line from the top of

the page, she says: "We never planted any trees, or seeds, or cuttings, or timber seed upon said land since 1889." So that as to the seventh allegation of falsity in the indictment, the testimony of the prosecutrix, and the only testimony upon that point in the case, corroborates the statement made by the Plaintiff in Error at the office of the Land Register, and hence this allegation of perjury must fail because the statement was true. This leaves only the eighth allegation of falsity in the indictment, which is that the prosecutrix, Margueriete A. P. Swacker had offered to sell or trade said tract of land. The Plaintiff in Error testifies before H. P. Wolcott, Register of the Land Office (Page 27 of the record.) in answer to the question of the Register: "State what you know, if anything, of the Defendant holding and offering this place for sale?"

Answer: "She offered to sell me the place for $550.00."

Question: "What time was that?"

Answer: "Last February, 1891, the day before the Defendant left the house."

Upon an examination of the testimony in the trial below we find in the testimony of the prosecutrix (Page 30 of the record.) that she contradicts the Plaintiff in Error. She says, "I never abandoned the place, or offered to sell the place to any one."

An examination of the entire testimony in the case discloses the fact that this is the only testimony contradicting the Plaintiff in Error upon that point; or the only testimony as to the falsity of the statement. The testimony of the prosecutrix shows that she moved away from the place in 1891, moving to Furley, Sedgwick County, Kansas. That she left the place in charge of Thomas M. Bucklin. All the testimony

shows that after having left the place in 1891, she was not back there for the purpose of looking after it.

It is an elementary principle of law that a person cannot be convicted of perjury upon the uncorroborated testimony of one witness when oral testimony is exclusively relied upon.

U. S. vs. Wood, 14 Pet. 430.

Not only is the testimony as to the falsity of this statement that the prosecutrix had offered to sell Plaintiff in Error this place, the uncorroborated testimony of one witness, but all the circumstances corroborate the statement of the Plaintiff in Error. So that we say Plaintiff in Error having testified to only two of the allegations of falsity set out in the indictment; one of these being true, and the other denied by the uncorroborated statements of one witness; that the verdict in the case was against the weight of the evidence and the law in the case. Said motion for a new trial should have been sustained by reason of the fact that the jury after having received the instructions of the Court, and after having deliberated upon their verdict three days, and having brought in a verdict of not guilty as to two of the defendants, and guilty as to one, shows that it was simply a compromise verdict. Particularly does this appear when the verdict was returned so soon after receiving the instruction of the Court that they could not disagree as to one one of the defendants. We think the motion for a new trial ought to have been sustained by the Court below on the ground of newly discovered evidence.

An examination of that motion for a new trial supported by the affidavit and letter of Mrs. Swacker, on

pages 35 and 36 of the record, which was discovered after the trial of said cause, shows conclusively that the prosecutrix offered to sell said timber claim and strongly corroborated Plaintiff in Error in his testimony before H. P. Wolcott, Register, on the ~~ninth~~ eighth allegation of perjury as laid in said indictment, proving his testimony on this point, that she had offered the claim to him for $550.00 to be true also.

T. T. TAYLOR,

DAVIDSON & WILLIAMS,

Attorneys for Plaintiff in Error.

Court Supreme Court U. S.
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In the Supreme Court of the United States.

OCTOBER TERM, 1895.

DANIEL A. BUCKLIN, APPELLANT,
v.
THE UNITED STATES. } No. 246.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

DANIEL A. BUCKLIN, PLAINTIFF in error,
v.
THE UNITED STATES. } No. 572.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

DANIEL A. BUCKLIN, APPELLANT,
v.
THE UNITED STATES.
No. 246.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

This was a criminal case, and was sought to be brought here by appeal.

Subsequently a writ of error was taken upon the same record, and the cause, No. 572, is set for hearing at the same time with this, and the assignments of error in the two records are identical.

In a suit at law, in which there was a trial by jury, the only proper way of bringing the case to the Supreme Court for review is by writ of error, and this case, being brought by appeal, should be dismissed. (*Savchet* v. *United States*, 12 Pet., 143; *Berins* v. *Ramsey*, 11 How., 185; *Burrows* v. *The Marshal*, 15 Wall., 682; *Stringfellow* v. *Cain*, 99

U. S., 610; *Hecht* v. *Broughton*, 105 U. S., 235; *United States* v. *Union Pac. R. R. Co.*, 105 U. S., 263; *Wolf* v. *Hamilton*, 108 U. S., 15; *United States* v. *Hailey*, 115 U. S., 233.)

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

DANIEL A. BUCKLIN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 572.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Defendant was indicted for perjury, convicted, and sentenced to imprisonment for the period of one and one-half years and to pay a fine in the sum of $100.

He was tried at the same time and before the same jury and upon the same evidence with two other defendants, who were separately indicted for perjury committed in the same proceeding.

POINTS AND ARGUMENT.

I.

The first assignment is as follows:

> The court erred in permitting the three cases, to wit, *The United States* v. *Thomas Bucklin*, and *The United States* v. *George Elder*, and *The United States* v. *Daniel A. Bucklin*, to be consolidated and tried together, and to the same jury, each of said defendants having been separately indicted (p. 39).

It appears that, after the trial, motion for new trial, motion in arrest of judgment and sentence, by an order nunc pro tunc, the journals of the court were corrected so as to supply an omission showing that—

> At the time of the trial of the above case the cases of *The United States* v. *Thomas Bucklin* and *The United States* v. *George Elder* were also tried at the same time and to the same jury, and said jury returned a verdict of "not guilty" as to Thomas Bucklin and a verdict of "not guilty" as to George Elder, and a verdict of "guilty" as to the above-named defendant (p. 18).

It nowhere appears that any objection was made or that any exception was taken to trying the cases together.

The motion for a new trial does not set this up as a ground for a new trial, nor does the motion in arrest of judgment (pp. 34, 35, and 37). It does not appear that at any time the attention of the trial court was called to this as an error.

This case comes squarely within that of *Logan* v. *United States* (144 U. S., 263, 296), in which this court said:

> By the third order of consolidation, indeed, made at February term, 1891, shortly before the trial, a

new indictment against different persons for the same crime was consolidated with the four indictments. But it is unnecessary to consider whether this was open to objection, since none of the defendants objected or excepted to it. They may all have considered it more advantageous or more convenient to have the new indictment tried together with the other four. Having gone to trial, without objection, on the indictments, as consolidated under the last order of the court, it was not open to any of them to take the objection for the first time after verdict.

II.

The second assignment is as follows:

> The court erred in its reply to the question of the foreman of the jury which tried said cause, when the said jury, after having deliberated upon their verdict for three days, on the 11th day of March, 1893, came into the court in a body and the foreman asked the court if the jury could agree as to some of the defendants and disagree as to one, and to which the court replied, "I think not; the jury can convict some of the defendants, and acquit some or find all guilty or all not guilty, but they can not find a verdict as to some and disagree as to one or more" (p. 39).

The language in the assignment differs from that set out in the bill of exceptions, which is as follows:

> You can find a verdict of guilty as to all, a verdict of not guilty as to all, or you can find some guilty and some not guilty, but you can not find a verdict as to some and disagree as to others (p. 34).

There was a verdict of not guilty as to two of the defendants and of guilty as to the plaintiff in error.

While section 1036 of the Revised Statutes is doubtless not applicable to separate cases upon independent indictments tried together, the instruction is so clearly erroneous as to suggest the probability of a mistake in the bill of exceptions.

But there should not be a reversal if it appear that the error could not have injured the defendant. It could not have so done unless it operated to coerce the jury. No part of the charge is set out in the record. As it is not before the court, and as there was no exception to any part of it, there is a conclusive presumption that it was correct, and that the jury was told that there was a presumption of innocence; that there could not be a conviction unless each juryman was satisfied, beyond a reasonable doubt, of the existence of every element necessary to make out guilt; and that to convict defendant all must agree that he was guilty. The jury could, under a different response to their question, have disagreed as to those whom they found not guilty. Is there any reason for saying that the charge may have operated to the prejudice of plaintiff in error and may have caused jurors who thought him innocent to find him guilty? If any of the jury had reasonable doubt as to guilt, they could not, under their oaths, render a verdict of guilty, and as they rendered such verdict against plaintiff in error, it was a declaration by each juror that they found him guilty beyond a reasonable doubt. On the other hand, if any of the jury had a reasonable doubt as to the guilt of the others, the entire jury, inasmuch as under the instructions of the court they could not disagree, had no alter-

native but to find them not guilty. Would not a jury find a verdict of not guilty under such a charge when otherwise they would have disagreed? The error operated to the benefit of those acquitted, but not to the detriment of the one who was convicted. A juryman who believed a man guilty would, if the others thought him innocent, come, under such a charge, to a verdict of acquittal. It is shocking to common sense to suppose it possible that any juror who thought a man innocent would agree to a verdict of guilty under like circumstances.

There is a wide difference between the error in this case and an error in charging the law in its application to the question of crime, for unless the error in the latter instance was clearly innocuous, it could not be positively affirmed that the jury was not misled to the prejudice of defendant. In such an instance the entire jury is expected to take the law as given by the court, and, under the influence of such an error, are liable to come honestly to a firm but wrong conclusion of guilt. This is not such a case. To admit the possibility of injury here, it must necessarily be assumed that one or more of the jury were convinced of the innocence or had at least a reasonable doubt of the guilt of plaintiff in error and were for acquittal, and that the error did not operate on the minds of any of the jury, so as to mislead them on the question of criminality, but only on those who thought him innocent, or had a reasonable doubt of his guilt, and not in a way to change their opinion on the law affecting the question of criminality, but to influence them to go

over in spite of their convictions to the other side, and to render a verdict of guilty, contrary to their oaths, against a man whom they could not under the charge convict. It rests not on any idea of coercion by the court, but upon the assumption that this error may have operated so as to let one part of a jury, which was not confined or starved into a verdict, coerce another part of a jury, and that the part for acquittal yielded. Such an assumption is unreasonable, and does violence to the intelligence and independence of American citizenship.

But the exception, under the rule adopted by this court, is too broad. This is not a capital case. The exception is not specific. It goes to the entire response of the court, which comprises four propositions.

While it may be said that the only erroneous part is that now complained of, and that the judge should have known at what the exception was aimed, this is no sufficient answer, for the same may be said of any charge where sound and unsound statements are blended.

The reason of the rule is that the judge may have an opportunity to correct errors, that the expense and delay of a new trial should not be incurred when it might be so easily obviated, and that a litigant should not be allowed to experiment in a trial.

It is apparent that any judge would, if his attention had been called to it, have at once corrected such a manifest error.

Not only was there a failure to call attention to this objection at the trial, but on the motion to set aside the verdict and grant a new trial (Rec., 34, 35) it was not so much as hinted at.

On the motion in arrest of judgment (Rec., p. 37), one ground stated is "Because of error of law occurring at the trial," but nothing specific is set out. For the first time this specific objection appears in the assignment of errors made after judgment and as a basis for review in this court. (Rec., p. 39.) It is insisted that the errors are specified too late to be considered.

In *Allis* v. *United States* (155 U. S., 121) this court said as follows:

> To the charge, of which the only portions preserved in the record are those just referred to, a single exception was taken in the following words: "The defendant excepts to the action of the court in recalling the jury and in arguing the testimony and in stating part of the testimony on certain points without stating the entire testimony." It is now insisted that the court expressed an opinion as to the inference to be drawn from the facts, argued the question of intent to the jury, and sought to coerce a verdict. But the exception taken is not sufficient to bring all these matters before us. There is no intimation in the exception that the defendant at the time thought that the court was trying to coerce the jury or suggested that its language might have such an influence upon them. Evidently the claim of coercion is an afterthought from subsequent study of the record. But it is settled that no such afterthought justifies a reviewing court in reversing the judgment. A party must make every reasonable effort to secure from the trial court correct rulings, or such at least as are satisfactory to him, before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions. Rule 4 of

this court provides: "The party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law—and those only—shall be inserted in the bill of exceptions and allowed by the court." Repeated decisions have emphasized the necessity of a strict adherence to this rule: "However it might pain us to see injustice perpetuated by a judgment which we are precluded from reviewing by the absence of proper exceptions to the action of the court below, justice itself and fairness to the court which makes the rulings complained of require that the attention of that court shall be specifically called to the precise point to which exception is taken, that it may have an opportunity to reconsider the matter and remove the ground of exception." (*Harvey* v. *Tyler*, 2 Wall., 328, 339.) "If it was intended to save an exception as to distinct propositions embodied in the instructions the attention of the court should have been directed to the specific points concerning which it was supposed error had been committed." (*Moulor* v. *Am. Life Ins. Co.*, 111 U. S., 335, 337.) "An exception 'to all and each part' of the charge gave no information whatever as to what was in the mind of the excepting party, and therefore gave no opportunity to the trial court to correct any error committed by it." (*Block* v. *Darling*, 140 U. S., 234, 238.) (See also *Phœnix Life Ins. Co.* v. *Raddin*, 120 U. S., 183, and cases cited in the opinion; *N. Y. and Colorado Mining Co.* v. *Frazer*, 130 U. S., 611; *Anthony* v. *Louisville and Nashville Railroad*, 132 U. S., 172.)

In *Alexander* v. *United States* (138 U. S., 353, 355) the court said:

> But the decisive answer to this assignment is, that the attention of the court does not seem to have been

called to it until after the conviction, when the defendant made it a ground of his motion for a new trial. It is the duty of counsel seasonably to call the attention of the court to any error in impaneling the jury, in admitting testimony, or in any other proceeding during the trial by which his rights are prejudiced, and in case of an adverse ruling to note an exception.

III.

The third assignment is as follows:

> The court erred in overruling the defendant's motion for a new trial (p. 39).

This can not be assigned as error. (*Arkansas Valley Land and Cattle Co.* v. *Mann*, 130 U. S., 69; *Ballitt County* v. *Washer*, *Id.*, 142; *Missouri P. R. R. Co.* v. *Chicago and A. R. R. Co.*, 137 U. S., 60; *Fitzgerald and M. Constr. Co.* v. *Fitzgerald*, 137 U. S., 98; *Ayers* v. *Watson*, 137 U. S., 584; *Van Stone* v. *Stillwell & B. Mufg. Co.*, 142 U. S., 128; *Holder* v. *United States*, 150 U. S., 91; *Blitz* v. *United States*, 153 U. S., 308.)

IV.

The fourth assignment is as follows:

> The court erred in overruling the motion of defendant in arrest of judgment (p. 39).

The motion in arrest of judgment is as follows:

> Now comes the defendant and moves the court to arrest the judgment of conviction in the above case for the reason that the indictment upon which the defendant was convicted does not state an offense under the laws of the United States.

Second. Because the verdict was contrary to the evidence in the case.

Third. Because of error of law occurring at the trial (p. 37).

First. The indictment is under section 5392, Revised Statutes, which is as follows:

> Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars and by imprisonment at hard labor not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed.

The indictment avers that Daniel A. Bucklin, within the jurisdiction of the court, being desirous of contesting a certain timber-culture entry before that time made and entered in the United States land office at Wichita by another, presented himself before H. P. Walcott, the properly appointed, qualified, and acting register of the United States land office for the division of the district where said land lay, at Larned, in the second division of the district of Kansas, and that the said Bucklin, after having been duly sworn by said register, who had competent authority to administer such oath, to testify truly, did then and there testify as a witness in his own behalf

in respect to said entry, and that he gave testimony which was material to the proceeding in question (the testimony being set out), and that in so doing the said witness falsely, knowingly, willfully, and feloniously gave said testimony, and that said statement and testimony were embodied in a written deposition, subscribed and sworn to by the said Bucklin before the said register to be true, and that in so doing he did willfully and corruptly commit perjury, when he, the said Bucklin, did not believe said testimony given by him, or any part of it, was true at the time he gave it.

Section 5392 was drawn by the revisers to cover all cases of perjury before either a judicial or administrative officer. (2 Com. D., 2518.)

The averments in the indictment fully conformed to the requirements of section 5396, Revised Statutes, which is as follows:

> In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed.

Similar averments in a prosecution for perjury were held sufficient in *Caha* v. *United States* (152 U. S., 211, 215, 216).

There can be no doubt that such contest as is charged was made was a case in which the law of the United States authorized an oath to be administered.

The act of June 14, 1878, chapter 190, (20 Statutes, 113), superseded all prior timber-culture acts. (Gould & Tucker's Notes, sec. 2464.)

Section 3 of said act provided for a contest as follows:

> That if at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws or by some other person under the provisions of this act: *Provided*, That the party making claim to said land, either as a homestead-settler or under this act, shall give, at the time of filing his application, such notice to the original claimant as shall be prescribed by the rules established by the Commissioner of the General Land Office; and the rights of the parties shall be determined as in other contested cases. (G. & T. Notes, p. 561.)

The act of March 3, 1891, entitled "An act to repeal the timber-culture law and for other purposes" (26 Statutes, 1095), reserved all rights under bona fide claims which had been lawfully initiated before the passage of the act. This act left such claims subject to forfeiture by a proper contest and proceedings thereunder, and therefore such a contest as that described in the indictment was authorized under existing laws.

Under section 2246, Revised Statutes, the register of the United States land office was authorized to administer any oath required by law or the instruction of the General Land Office in connection with the entry or purchase of any tract of public lands.

An oath administered in a proceeding contesting an entry is an oath administered "in connection with the entry or purchase" of public lands.

By section 8 of the regulations under the timber-culture law, approved by Secretary Lamar July 12, 1887, "all affidavits required under the timber-culture laws must be made before the register or the receiver or the clerk of some court of record, or officer authorized to administer oaths in the district where the lands are situated." (Matthew's Guide to Public Lands, p. 151.)

By section 28 of the same rules it is provided as follows:

> Contests may be instituted against timber-culture entries for illegality or fraud in the inception of the entry, failure to comply with the law after entry, or for any sufficient cause affecting the legality or validity of the claim. (Matthew's Guide, p. 153.)

Under sections 441, 453, and 2478, Revised Statutes, the Secretary of the Interior had the authority to make such rules and regulations, and such rules will be taken cognizance of by this court, and swearing in a contest instituted under such rules so made is perjury. (*Cohn* v. *United States*, 152 U. S., 211, 218, 219.)

Second. The second ground assigned is that the verdict is contrary to the evidence in the case. This was a

question proper to be raised on motion for a new trial, and not upon motion in arrest of judgment.

The granting or refusing of the motion for a new trial on the ground that the verdict was against the weight of evidence is a matter of discretion, not reviewable here. (*Crumpton* v. *United States*, 138 U. S., 361; *Wilson* v. *Everett*, 139 U. S., 616; *Moore* v. *United States*, 150 U. S., 57.)

It is contended, however, that Bucklin could not be convicted, because the only averment in the indictment charging perjury which was covered by his testimony before the commissioner was that set out in the eighth division, as appears on page 6 of the brief of plaintiff in error, to the effect that Mrs. Swacker "had offered to sell or trade said tract of land above described." The contention is that, under the authority of *United States* v. *Wood* (14 Pet., 430), there could be no conviction, because the only direct testimony was that of Mrs. Swacker and plaintiff in error, and the evidence of one witness would be insufficient to convict in case of perjury. It must be borne in mind that there is no dispute as to what he swore before the commissioner, for a certified copy of that appears in the record.

He swore on this point in the contest case, that Mrs. Swacker offered to sell him the place for $550 in February, 1891, before she left the place. (Rec., p. 27.)

On the trial of this case Mrs. Swacker swore that she never offered to sell the place to anyone. (Rec., p. 30.)

Plaintiff in error was introduced to contradict her. Her testimony was broad and covered every time and

place, and was equivalent to her swearing that she had not offered to sell him the place in February, 1891, before she left it.

He does not contradict her in this, but says "Mrs. Swacker offered to sell me the timber claim in question in April, 1891, since she moved away from the same to Furley, Sedgwick County, Kans., for $550." (Rec., p. 34.)

This variance itself between the times and places given by him was enough to discredit, and doubtless did discredit, his testimony before the jury.

On the former trial he swore she offered to sell him the place in February, 1891, before she left it, and in the present trial he gave a different time and a different place, and never undertook to in any way explain his swearing in the former trial. It is submitted, therefore, then, that he does not contradict Mrs. Swacker, but in fact impeaches his own testimony, and that it is not a case of one oath against another oath.

This case falls within the rule of *Crumpton* v. *United States* (138 U. S., 361), in which it was held that this court will not consider whether a verdict was contrary to the evidence if there was any evidence proper to go to the jury in support of the verdict.

Third. The third ground is that there was error of law occurring at the trial.

This assignment is too vague and indefinite, and it does not appear what questions of law were brought to the attention of the trial court. That court could not be put in error upon such a general assignment.

V.

The fifth assignment is as follows:

> The court erred in rendering a judgment of conviction in said case against the defendant. (Rec. p. 39.)

This assignment is entirely too general and embraces all the questions that could have been raised, both on motion for new trial and in arrest of judgment, and is not sufficiently specific to be noticed here.

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